Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1797

SHIMON NEWHOUSE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SHIMON NEWHOUSE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Shimon Newhouse, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit

entered on March 29, 1979, which affirmed a judgment of the United States District Court for the Eastern District of New York convicting him of making, and causing to be used, a false writing in a matter within the jurisdiction of a department or agency of the United States, in violation of 18 U.S.C. §§ 1001 and 2.

OPINION BELOW

The Court of Appeals did not issue a formal opinion. A copy of the Court of Appeals' judgment and order of affirmance is annexed hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 29, 1979. A copy of the judgment is annexed hereto as Appendix A.

A timely petition for rehearing and rehearing en banc was denied on May 8, 1979. Copies of the separate orders denying rehearing and rehearing en banc are annexed hereto as Appendices B and C respectively. Jurisdiction of this Court is evoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Was it permissible, consistent with the constitutional principles enunciated in In Re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975), for the government prosecutor to tell the jury during his summation, that the defense could have challenged the accuracy of the government's handwriting evidence by exercising the defense's right

to a court issued subpoena to produce any expert witness of its own choosing; was this shifting of the burden of proof particularly egregious under the circumstances of this case since the documents in question were the sole basis of the offense charged.

2. Whether the Court of Appeals properly sustained the allegation of venue particularly in light of the fact that the Court of Appeals premised its holding on a theory not urged to the jury by the government, which holding was at odds with the trial court's jury instruction, was not supported by the plain terms of the offense alleged in the indictment and conflicts with prior holdings of this Court in Travis v. United States, 364 U.S. 631 (1961) and United States v. Johnson, 323 U.S. 273 (1944).

3. Was the Court of Appeals correct in finding that the appellant knew that the documents he allegedly authored bore an intended relationship to a matter within the jurisdiction of a department or agency of the United States, and did the Court in so holding conflict with decisions of the Court of Appeals for the Eighth and Fifth Circuit as well as a prior holding of the Second Circuit.

4. Whether, under the test propounded in Kotteakos v. United States, 328 U.S. 750 (1946), certain documents admitted into evidence for one purpose, but utilized impermissibly for another, unduly and necessarily contributed to appellant's conviction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional privision involved is the venue clause contained in the Sixth Amendment to the United States Constitution. The statutes implicated herein is Title 18, United States Code, Sections 1001 and 2. Also involved are Federal Rules of Evidence, Rules 802 and 803 (subdiv. 6). These provisions are set forth in full in Appendix D, annexed hereto.

STATEMENT OF THE CASE

Following a trial before a jury in the Eastern District of New York, petitioner was convicted on all counts of a twenty-five count indictment that charged him with making, and causing others to use, a series of false statements and writings in a matter within the jurisdiction of a department and agency of the United States, in violation of 18 U.S.C. §§ 1001, 2. He received concurrent sentences of one year and one day on each count.

On appeal and in this petition, petitioner contends that venue for the offenses charged was improperly placed in the Eastern District of New York; that venue was sustained by the Court of Appeals on a theory at odds with the terms of the indictment, the trial court's instructions to the jury, and the government's theory of proof. It is also contended that the basis upon which the Court of Appeals concluded that petitioner knew that the critical documents were intended to have a relationship to a federal program, was not substantiated by the evidence of record, and, in any event, conflicts with holdings in the Fifth and Eight Circuit. Moreover, petitioner asserts that he was denied a fair trial by the impermissible use of certain documents, that constituted hearsay evidence, to establish a critical allegation in the indictment. Finally, petitioner contends that he was denied his constitutional rights when the prosecutor argued to the jury the defense's failure to utilize subpoena power to contest the accuracy of the prosecution's handwriting witness' expert opinion.

1. Venue

Petitioner contended in both the District Court and in the Court of Appeals that venue

had been improperly placed in the Eastern District of New York. Specifically, with respect to Counts Seventeen through Twenty-Five of the indictment -- concerning the false invoices -- no testimony demonstrated that these documents had been received or used by the Hassidic Corporation for Urban Concerns (HCUC), in Brooklyn. Indeed, the only testimony indicating any use of the invoices clearly established their sole use in Princeton, New Jersey. The Court of Appeals concluded that "HCUC's receipt, maintenance and use of the falsified documents ... at its headquarters in the Eastern District is sufficient to lay venue within the Eastern District. Such maintenance by HCUC was required under federal regulations." (Appendix A at A). By relying on a theory of maintenance of records to sustain venue, the Court of Appeals recast the theory of venue utilized by the Government at trial, was at odds with the District Court's instructions to the jury, and it falls outside the scope of conduct proscribed by 18 U.S.C. §§ 1001, 2.

Title 18, U.S.C. § 1001 prohibits the making or the causing to be used of false documents that are concerned with a matter within the jurisdiction of a department or agency of the federal government. The Government conceded in its brief in the Court of Appeals that venue was not based upon authorship or mailing of the documents in the Eastern District of New York. Moreover, with one exception not relevant here, the Government acknowledged that the documents were not filed with federal officials in that District. Hence, the only remaining basis for venue, according to the offense charged, was a use of the false documents in the District.

An examination of the indictment reveals that the Government premised venue on a use

of the documents by HCUC within the Eastern District of New York. Specifically, the indictment in Counts Seventeen through Twenty-Five alleged that on May 19, 1976, the false documents were used. However, that May, 1976 date was the very date that the documents were used by HCUC in Princeton, New Jersey. No evidence of record establishes a maintenance or use of the invoices in the Eastern District.

In its supplemental instruction to the jury, the District Court charged on venue as follows:

> THE COURT: All right. One of the attorneys is concerned that I used, in some portion of my charge in discussing the issue of venue, the word "Consequences", and that I stated that it would be sufficient if the consequences of the crime occurred or were felt within this district. I don't recall that I did use that word, but in all events, that is not a proper statement of the law. Just now, to clarify it, I'll restate very briefly a portion, the kernel of what I did say on the subject; and that was that, if a crime is begun, continued or completed at a particular place, if an overt act was done by a defendant in that place with the intention that the act assists in either commencing, carrying forward or completing the criminal purpose, and that act intended to commence, carry forward or complete the criminal purpose can, in the circumstances of this case, be either the act of making or using the documents or writings with which we are concerned, or causing those writings and documents to be made or used. (Emphasis added).

It is readily apparent that as the issue of venue was framed for the jury, it had to find that either the petitioner made the documents in the Eastern District or caused HCUC to use them there. No notion of mere possession of records within the District was proferred by the trial court or the Government as supportive of the venue allegation. The supplemental jury instruction was not only compatible with the allegations of the offense contained in the indictment, but with the elements of the crime charged under 18 U.S.C. §§ 1001 and 2. § 1001 does not proscribe the mere possession of false documents; nor did the indictment. Parenthetically it should be noted that the Government did not cite to the Court of Appeals a single case in support of the view that causing the maintenance by a third party of false writings gives rise to venue under § 1001.*

2. The Knowledge Requirement Under 18 U.S.C. § 1001.

Petitioner contended with respect to Counts One and Two that the Government had failed to establish petitioner's knowledge that the documents under these counts had a nexus to a matter within the jurisdiction of a federal agency. The Court held that such

*The Government conceded that the Daily Site Supervisor Sheets that formed the basis for Counts Three through Sixteen were never filed with the federal agency. The key government witness, with respect to these records, was unable to recall ever seeing, let along using, the Daily Sheets. Thus, for these records as well as the invoices, there was no showing of use in the Eastern District of New York.

knowledge could be inferred from, inter alia, the false documents themselves. (Appendix A at A). An examination of these documents reveals no indicia of a nexus to a federal program.

3. The Impermissible Use of Hearsay Evidence.

The petitioner contended below that while it may have been proper to admit certain false documents into evidence* in order to establish his authorship thereof, it was improper for the Government to assert and utilize these writings for the truthfulness of certain portions thereof without satisfying the foundational requirements of Rule 803(6), F.R.E. (Records of a regularly conducted activity require, prior to admission in evidence, the testimony of a custodian that it was the regular practice to make the record in the regular activity of the business.) To the extent that the writings were thus used, they constituted inadmissible hearsay evidence. See, Rule 802, F.R.E. There can be no doubt that the writings were so employed since government counsel in summation urged the jury to so consider the documents. Nor can it be gainsaid that the truthfulness of these portions of the records was unimportant since it concerned the very dates charged in the indictment as to when the offenses charged were committed.

4. The Shifting of the Burden of Proof.

Finally, petitioner urges review of his conviction upon the ground that the prosecution impermissibly suggested to the jury in

*These documents, the Site Supervisor Daily Report Sheets, comprised the basis of Counts Three through Sixteen of the indictment. These writings were on HCUC supplied forms.

closing argument that the defense could have produced its own handwriting expert if there was a serious dispute as to the authorship of the critical documents. With the consent of the trial judge, the prosecutor advised the jury that the defense had "the full subpoena power of this Court to call whatever witnesses they want, including expert witnesses."

REASONS FOR GRANTING THE WRIT

1. By relying upon a notion of mere possession to sustain venue, the Court of Appeals' decision is in direct conflict with prior decisions of this Court.

In Travis v. United States, 364 U.S. 631 (1961), the defendant was similarly charged with violating § 1001, in that he made and filed a false non-Communist affidavit as required by § 9(h) of the National Labor Relations Act. The affidavit had been made, executed and mailed in Colorado, but received and filed in Washington, D.C. This Court concluded that since the filing (i.e., the use) occurred in Washington, D.C., venue in Colorado was improper. Travis v. United States, supra, at 636. It was only at Washington, D.C. that the document became a "matter within the jurisdiction" of the Board. Id. Since venue in criminal cases is not a mere procedural or technical matter but, rather, raises "deep issues of public policy," venue is not to be liberally construed. United States v. Johnson, 323 U.S. 273, 276 (1944); Travis v. United States, 364 U.S. at 634. To determine the situs of venue, courts must examine the offense charged and the location of the acts constituting it. United States v. Anderson, 328 U.S. 699, 703 (1946). Thus, in the case at bar, the crime is causing the use of the documents, not their maintenance. Such use occurred only

in New Jersey. The panel decision, relying as it does on a maintenance theory, disregards settled principles established by this Court.

2. The Court of Appeals, in concluding that the Government had established the requisite knowledge under 18 U.S.C. § 1001, is in direct conflict with decisions of the Eighth, Fifth and Second Circuits.

The Eighth Circuit in United States v. Ebeling, 248 F.2d 429 (8th Cir. 1957), cert. denied, 355 U.S. 907 (1957), concluded that the defendants there had knowledge of a federal nexus since one defendant directly contracted with a federal agency; each defendant knew the documents were to be filed with the Department of the Army; and the contract on its face indicated that it was subject to the federal Renegotiation Act of 1951. In United States v. Lowe, 141 F.2d 1005 (5th Cir. 1944), the Court of Appeals held that a false statement as to hours of employment did not constitute a violation of 18 U.S.C. § 80 (the predecessor of § 1001), since the employment of defendant by the shipbuilding company (who was reimbursed with federal funds) derived from his private contract with the company. In Lowe, there was no evidence to indicate that the employee defendant knew that his wages had been made the subject of an express contract provision between his employer and the Government. In United States v. Candella, 487 F.2d 1223 (2d Cir. 1973), the court found that the involvement of a federal department had been made abundantly clear to the defendants since the pertinent affidavits executed by them made express reference to federal law, federal department interest in the matter, and punishment under federal law for any false statement. The Fifth Circuit in United States v. Lange, 528 F.2d 1280 (5th Cir. 1976), reached a similar conclusion based upon similar indicia of knowledge. In the instant case, the Court of Appeals affirmance conflicts with the foregoing holdings in that no document, on its face, bears reference to a federal nexus with the subject matter. Prior to the petitioner's

meeting with a federal official,* there is no evidence that he knew that his involvement with HCUC was other than a private contract not subject to a federal connection.

Other cases have held expressly or by implication, that a defendant must be shown to have an awareness of the nexus between the authored documents and the matter that is within the jurisdiction of a federal agency. United States v. Giarraputo, 140 F. Supp. 831, 833 (E.D.N.Y. 1956) (the defendant knew that a security clearance questionnaire he filled out for his employer was to be submitted to the Department of Defense); United States v. Myers, 131 F. Supp. 525, 530 (N.D. Calif. 1955) (defendant, a federal employee, knew that the document he falsely completed, which purported to transfer ownership of a surplus government vehicle, was to be filed with his federal employer); United States v. Greenberg, 268 F.2d 120 (2d Cir. 1959) (defendant, a general contractor with the Government, knew that weekly wage reports filed with the Government had been falsified by a subcontractor at his instigation); United States v.

*The documents comprising Counts One and Two were on HCUC devised forms, not government forms, and were submitted to HCUC before appellant's meeting with the federal official who acquainted him with the workings of the federal lunch program. Even the Government acknowledges that appellant's knowledge was both qualitatively and quantitatively different as a result of this meeting. Thus, in its brief to the Court of Appeals, the Government noted:

> "Accordingly, evidence of Newhouse's knowledge of the nature of HCUC's Program ... demonstrated such a thorough knowledge of the Program that the jury could have concluded that the defendant's expertise was gained through his interview with Mr. Boranian of the [federal] Food and Nutrition Service."
> (Appellee's Brief, at p. 25.)

Kraude, 467 F.2d 37 (9th Cir.), cert. denied, 409 U.S. 1076 (1972) (even though defendant, a psychiatrist, submitted medicare reimbursement claims to a private insurance carrier, he knew that the carrier was the payment agent for HEW).

3. The Court of Appeals failed to apply the test of error enumerated in Kotteakos v. United States, 328 U.S. 750 (1946), with respect to certain hearsay documents.

As noted supra, at page 9, the Government introduced in evidence Daily Site Supervisor Reports for the purpose of establishing the petitioner's authorship of these records. These records constituted the core evidence under Counts Three through Sixteen. However, in summation to the jury, the prosecutor urged the jury to consider the documents as demonstrating the truthfulness of another aspect of the prosecution's case, i.e., the dates of the alleged offenses under these counts. As noted earlier, these documents were records of HCUC. No testimony was offered to establish the foundational requirements mandated by Rule 803(6), F.R.E. As such, the documents constituted inadmissible hearsay evidence. Rule 802, F.R.E. In determining the extent to which a conviction may be sustained in light of the erroneous receipt of hearsay evidence, this Court has held in Kotteakos, supra:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but slight effect, the conviction should stand...."
> Kotteakos v. United States, at 764-765.

See also, United States v. Quinto, 582 F.2d 224, 235 (2d Cir. 1978); United States v. Ruffin, 575 F.2d 346, 359 (2d Cir. 1978). The specificity of the documents, their direct relationship to the offense charged, and their central role in

the testimony of the government's handwriting expert, compels the conclusion that it would be an "unusual juror who would be unimpressed and uninfluenced" by their impact. United States v. Quinto, supra, at 235.

4. The Government impermissibly shifted the burden of proof to the defense by advising the jury that the defense could have subpoenaed a handwriting expert to contradict the prosecution's proof.

This was not a case where the defense refrained from calling an available witness to testify to some fact in dispute and thus contradict the government's position. See, e.g., United States v. Lopez, 584 F.2d 1175 (2d Cir. 1978); United States v. Bubar, 567 F.2d 192 (2d Cir.), cert. denied, 434 U.S. 872 (1977). By so advising the jury, the prosecution was elevating its opinion evidence to the level of uncontradicted fact. This argument impermissibly lightened the government's burden of proving each essential allegation beyond a reasonable doubt and improperly shifted to the defense the obligation to rebut the government's opinion witness. This was error of constitutional magnitude. In Re Winship, 397 U.S. 358, 364 (1970); Mullaney v. Wilbur, 421 U.S. 684, 696-702 (1975). U.S. Const., Amend. VI.

CONCLUSION

The Petition Should Be Granted.

Respectfully submitted,

Samuel H. Dawson
Attorney for Petitioner

APPENDICES

United States Court of Appeals

FOR THE

SECOND CIRCUIT

APPENDIX A

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of March, one thousand nine hundred and seventy-nine.

Present:

HONORABLE J. EDWARD LUMBARD

HONORABLE WILFRED FEINBERG

HONORABLE JAMES L. OAKES

Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

- against -

SHIMON NEWHOUSE,

Appellant.

78-1422

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

This is an appeal from a judgment of conviction following a jury trial held before Judge Sifton in the United States District Court for the Eastern District of New York, wherein appellant was found guilty of 25 counts of making and causing the use of false statements and writings in a matter within the jurisdiction of a

department or agency of the United States in violation of 18 U.S.C. §§ 1001, 2. Appellant was sentenced to 25 concurrent jail terms of one year and one day. Evidence introduced at trial tended to show that appellant supplied fictitious information regarding non-existent meals at non-existent campsites, purporting to be located in Brooklyn and Staten Island, to the government through The Hassidic Corporation For Urban Concerns (HCUC) headquartered in Brooklyn, in order to obtain reimbursement for the "meals" under the Summer Food Service Program For Children administered by the Department of Agriculture.

Appellant first claims improper venue in prosecuting him for the crimes charged in the Eastern District. HCUC's receipt, maintenance and use of the falsified documents upon which the charges are based at its headquarters in the Eastern District is sufficient to lay venue within the Eastern District. Such maintenance by HCUC was required under federal regulations.

Appellant next argues that the government failed to introduce evidence sufficient to prove that appellant knew the falsified documents were connected to the federal lunch program. Certainly with regard to all documents prepared after the meeting between appellant and the official from the Department of Agriculture, the claim is not even remotely plausible. Even as to the few documents arguably prepared prior to that meeting, the jury could infer from all the evidence, including the falsified documents themselves, that appellant knew they were to be used in connection with the federal lunch program.

Appellant challenges the admissibility of a number of documents on the ground that they were not properly authenticated. The claim is without merit since there was testimony of a handwriting expert to the effect that appellant was the author of the documents. Appellant raises other points, which we find to be devoid of merit. We therefore affirm the judgment of conviction in all respects.

J. EDWARD LUMBARD

WILFRED FEINBERG

JAMES L. OAKES

Circuit Judges

United States Court of Appeals

SECOND CIRCUIT

APPENDIX B

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of May , one thousand nine hundred and seventy-nine.

Present: HON: J. EDWARD LUMBARD,

HON: WILFRED FEINBERG,

HON: JAMES L. OAKES,

Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RABBI SHIMEON NEWHOUSE, Defendant-Appellant.	78-1422

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Rabbi Shimeon Newhouse

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro,
Clerk.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

APPENDIX C

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of May , one thousand nine hundred and seventy-nine.

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UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.
RABBI SHIMON NEWHOUSE,
Defendant-Appellant. 78-1422

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Rabbi Shimon Newhouse, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Irving R. Kaufman

IRVING R. KAUFMAN,
Chief Judge

APPENDIX D

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

TITLE 18, UNITED STATES CODE SECTION 1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

SECTION 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal.

FEDERAL RULES OF EVIDENCE
RULE 802

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

RULE 803(6)

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.